



NORTH CAROLINA LAW REVIEW

Volume 49 | Number 2

Article 7

2-1-1971

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Recommended Citation

Louis W. Payne Jr., *Admiralty -- Wrongful Death Action Under General Maritime Law*, 49 N.C. L. REV. 329 (1971).

Available at: <http://scholarship.law.unc.edu/nclr/vol49/iss2/7>

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In the face of the Court's apparent disregard of the law of the flag, extension of the reasoning applied in *Rhoditis* would leave virtually no contact insufficient for the application of American law. Maintenance of a United States office could be the critical factor rendering a legitimate foreign shipper liable under the Jones Act. Foreign shipowners are encouraged to locate their "base of operations" elsewhere, lest they are forced to shoulder a burden they would not otherwise encounter.

Another necessary consequence of this decision is the additional burden the already overcrowded United States courts can look forward to in the way of unnecessary, unwarranted, and ill-advised litigation by foreign seamen attempting to take advantage of the liberal provisions of the Jones Act rather than proceeding in the appropriate foreign jurisdiction. The Supreme Court has held that the Jones Act is "welfare legislation . . . entitled to a liberal construction to accomplish its beneficent purposes."⁶¹ This pronouncement is in line with a trend in admiralty law manifested most recently by the decision in *Rhoditis*. Despite the humanitarianism of this action, reasoned, logical, consistent development of the law is perhaps more to be desired. An examination by the Court, not only of the direction of their decisions in this area, but of the motivating forces behind them might well be in order.⁶²

JOHN E. HODGE, JR.

Admiralty—Wrongful Death Action Under General Maritime Law

In *Moragne v. States Marine Lines, Inc.*¹ the Supreme Court of the United States held for the first time that an action will lie under general maritime law for death caused by a violation of maritime duties. In so holding, the court specifically overruled an 1886 decision² and took a giant stride toward clearing up what had become a legal morass of anomalies and inequities.

The plaintiff in *Moragne*, alleging both negligence and unseaworthiness, sued in a Florida state court seeking to recover damages from a shipowner for the wrongful death of her husband, a longshoreman, aboard a vessel on navigable waters within the state of Florida. The suit was

⁶¹ *E.g.*, *Cosmopolitan Shipping Co. v. McCallister*, 337 U.S. 783, 790 (1949).

⁶² *See* H. BAER, *supra* note 27, at 192.

¹ 398 U.S. 375 (1970).

² *The Harrisburg*, 119 U.S. 199 (1886).

removed to the United States District Court for the Middle District of Florida which dismissed the unseaworthiness claim but made the necessary certification under 28 U.S.C. § 1292(b)³ to allow plaintiff an interlocutory appeal to the Court of Appeals for the Fifth Circuit. The court of appeals, under a procedure provided by Florida state law,⁴ certified to the Florida Supreme Court the question of whether the Florida wrongful death statute encompassed a cause of action for unseaworthiness. The Florida court answered that question in the negative,⁵ and on return of the case to the court of appeals, the order of the district court was affirmed.⁶ The Supreme Court of the United States granted certiorari⁷ and invited the United States to participate as amicus curiae.⁸ Before discussing the court's decision, it will be helpful to first obtain a view of the law of maritime wrongful death as it stood before *Moragne*.

MARITIME WRONGFUL DEATH

Maritime Duties Generally

Since ancient times seamen who have been injured or taken sick while in the service of their ship have been entitled to maintenance and cure,⁹ which includes living allowance, nursing and medical expenses, and wages until they recover.¹⁰ This remedy is available regardless of the presence or absence of fault, but it provides the seaman with no real compensation—rather it merely sustains him during his recovery.¹¹

In seeking a compensatory recovery, however, the seaman may also avail himself of two other grounds: breach of the duty of seaworthiness and breach of the duty of care. The duty of seaworthiness¹² is a develop-

³ 28 U.S.C. § 1292(b) (1964) provides for the court of appeals to allow, at its discretion, an appeal to be taken from an otherwise not appealable order in a civil action if the district judge states in writing that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion . . ."

⁴ FLA. STAT. ANN. § 25.031 (1970).

⁵ *Moragne v. States Marine Lines, Inc.*, 211 So. 2d 161 (Fla. 1968).

⁶ *Moragne v. States Marine Lines, Inc.*, 409 F.2d 32 (5th Cir. 1969).

⁷ *Moragne v. States Marine Lines, Inc.*, 396 U.S. 900 (1969).

⁸ *Moragne v. States Marine Lines, Inc.*, 396 U.S. 952 (1969).

⁹ H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-1, at 1 (2d ed. 1969) [hereinafter cited as BAER].

¹⁰ BAER § 1-2, at 6.

¹¹ BAER § 1-4, at 13.

¹² "Seaworthiness" has been defined as the "absolute nondelegable duty of a shipowner to provide . . . a vessel 'sufficient in all respects for the trade in which it is employed' . . . and to prevent . . . injury [to seamen] by any part of the vessel or equipment used in the ordinary course of their employment." *Moragne v. States Marine Lines, Inc.*, 211 So. 2d 161, 163 (Fla. 1968).

ment of the maritime case law and traces its beginnings back to the late nineteenth century.¹³ Since the decision of the Supreme Court in *The Osceola*,¹⁴ the generally accepted view has been that this duty imposes liability absolutely.¹⁵

The duty of care was of little use to seamen until 1920 because the duty did not extend to injuries suffered from the negligence of members of the ship's company.¹⁶ In 1920, however, this duty was given substance with the enactment by Congress of two statutes: the Jones Act¹⁷ which incorporates part of the Federal Employers Liability Act¹⁸ and gives seamen essentially the same rights against their employers as railroad employees are given against their employers; and the Death on the High Seas Act¹⁹ which provides a more general cause of action for wrongful death caused by "wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state."

Wrongful Death Actions

At first glance it would seem that, if a person to whom one of these duties is owed were killed as a result of a breach of one of the duties, a wrongful death action would lie against the breaching party. In fact, however, the law on this point before *Moragne* was much more complex. The problem began with the Supreme Court's 1886 decision, *The Harrisburg*,²⁰ which quite bluntly held that the maritime law does not afford an action for wrongful death in the absence of a statute granting such an action. Between 1886 and 1920 the only recoveries for maritime wrongful deaths were in cases in which the federal courts allowed the application of state wrongful death statutes.²¹ Then in 1920 the two previously

¹³ *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 544 (1960).

¹⁴ 189 U.S. 158 (1903).

¹⁵ *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960).

¹⁶ *The Osceola*, 189 U.S. 158 (1903).

¹⁷ 46 U.S.C. § 688 (1964). In addition to granting an injured seaman a right to sue for negligence, this act also gives the personal representative of a deceased seaman a cause of action for the seaman's death if the seaman died because of the negligence of the employer.

¹⁸ 45 U.S.C. §§ 51-60 (1964). "The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach of the duty of care, analogous but by no means identical to the general common law duty" *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958).

¹⁹ 46 U.S.C. §§ 761-68 (1964).

²⁰ 119 U.S. 199 (1886).

²¹ *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970). *E.g.*, *The Hamilton*, 207 U.S. 398 (1907) (Delaware wrongful death statute applied where the vessels were owned by Delaware corporations).

mentioned acts were enacted. In addition, all of the states have enacted wrongful death statutes.²² It has been in the interpretation of rights under these various statutes that the confusion has arisen.

In 1930, ten years after the passage of the two acts, the Supreme Court said, in dictum, that the Jones Act provides the exclusive remedy for the death of a seaman.²³ In 1964, in *Gillespie v. United States Steel Corp.*,²⁴ the Court, relying on the earlier dictum, arrived at the same conclusion. This would seem to indicate that any recovery for the wrongful death of a seaman must depend upon a showing of negligence. However, in *Kernan v. American Dredging Co.*,²⁵ the Court inserted a footnote²⁶ which has been construed by at least three authorities as meaning that unseaworthiness is a basis for recovery under the Death on the High Seas Act.²⁷ It is clear that the Court in *Moragne* attaches such a meaning to the footnote.²⁸ Therefore the law as it applied to seamen before *Moragne* apparently was that beyond a marine league from shore, a wrongful death action would lie for unseaworthiness, but that within a marine league recovery would have to rest upon a showing of negligence under the Jones Act.

In construing the rights of land-based workers, however, the Supreme Court has been more generous. In 1926, in a suit by a stevedore against his employer, the Court classified the stevedore as a seaman because he was rendering a "maritime service formerly rendered by the ship's crew."²⁹ Thus he was allowed to recover under the Jones Act. This holding was amplified twenty years later in *Seas Shipping Co. v. Sieracki*³⁰ in which the Court allowed an injured stevedore to sue a shipowner on a theory of unseaworthiness despite Justice Frankfurter's dissenting opinion that the duty of seaworthiness is owed only to seagoing crew

²² 398 U.S. 375, 390 (1970).

²³ *Lindgren v. United States*, 281 U.S. 38 (1930).

²⁴ 379 U.S. 148 (1964).

²⁵ 355 U.S. 426 (1958).

²⁶ *Id.* at 430 n.4, which states, "Where death occurs beyond a marine league from state shores, the Death on the High Seas Act . . . provides a remedy for wrongful death. Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right. . . ."

²⁷ *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395 (1970); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 159 (1964) (dissenting opinion by Goldberg, J.); 1 P. EDELMAN, MARITIME INJURY AND DEATH 235 (1960).

²⁸ 398 U.S. at 395.

²⁹ *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).

³⁰ 328 U.S. 85 (1946).

members because only they are "exposed to the perils of the sea and all the risks of unseaworthiness, with little opportunity to avoid those dangers or to discover and protect themselves from them or to prove who is responsible for the unseaworthiness causing the injury."³¹ Since the decision in *Sieracki* the Court has extended the duty of seaworthiness to "an electrician, a ship cleaner, a shoreside watchman, a repairman, a rigger"³² and others. Two 1959 cases—*The Tungus v. Skovgaard*³³ and *United New York & New Jersey Sandy Hooks Pilots Association v. Halecki*³⁴—illustrate the pre-*Moragne* status of the maritime wrongful death law as applied to land-based workers as a result of the preceding line of cases. In *The Tungus* the Court found the New Jersey wrongful death statute broad enough to encompass an action for death caused by unseaworthiness in state waters and, therefore, allowed the survivor of an oil company's maintenance foreman to recover for the foreman's death. There was never any question that a duty of seaworthiness was owed to the decedent. The only argument was whether the duty was contained in state law as the majority claimed,³⁵ or in federal law (with state law providing a remedy) as the minority claimed.³⁶ In *Halecki* the Court disallowed a similar suit for recovery for the death of an employee of an electrical concern because the Court found that he was not, under the *Sieracki* rule, one to whom the duty of seaworthiness was owed. The Court restated the test as whether the person involved was doing "work traditionally done by members of the crew."³⁷ In short, the earlier line of cases established a duty of seaworthiness to certain land-based workers for which a wrongful death recovery could be obtained if the worker met the *Sieracki* test, and if the applicable state wrongful death statute contained the duty of seaworthiness.

In summary, the end result of all of these cases was that recovery for the death of a land-based worker can often be had more easily than a recovery for the death of a seagoing crew member. Justice Goldberg seems to be correct in his criticism of this situation:

³¹ *Id.* at 104.

³² 1 P. EDELMAN, MARITIME INJURY AND DEATH 177 (1960) (footnotes omitted).

³³ 358 U.S. 588 (1959).

³⁴ 358 U.S. 613 (1959).

³⁵ *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959).

³⁶ *Id.* at 601. (Brennan, Black and Douglas, J.J., and Warren, C.J., concurring in part and dissenting in part).

³⁷ 358 U.S. at 617.

[T]he Court today preserves an anomaly in admiralty law which has neither reason nor justification. A seaman who is either injured or killed while on the high seas is given a remedy for either negligence or unseaworthiness, . . . a seaman who is injured in territorial waters may also sue for either negligence or unseaworthiness, . . . an injured seaman may also sue for maintenance and cure and these claims survive his death, . . . a nonseaman's death in territorial waters gives rise to an action based upon the applicable state wrongful death statute for both negligence and the general maritime doctrine of unseaworthiness. . . . Only the family survivors of a seaman are left without a remedy for his death within territorial waters caused by failure to maintain a seaworthy vessel. Only they are denied recourse to this rule of absolute liability and relegated to proof of negligence under the Jones Act. This disparity in treatment has been characterized by the lower federal courts as "deplorable," "anomalous," "archaic," "unnecessary," and "hard to understand." . . . I agree with these characterizations.³⁸

THE MORAGNE DECISION

Early in the *Moragne* decision the Court concludes that "the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg*, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed."³⁹ The Court attacks *The Harrisburg* as being quite likely wrong when it was decided.⁴⁰ But the real basis of the decision is the Court's determination that developments since *The Harrisburg* have rendered that case invalid.⁴¹ The developments in question are the rejections—partly judicial, but largely legislative—of the old common law policy against recovery for wrongful death; these developments include the adoption by every state and by Congress of statutes allowing wrongful death recoveries.⁴² On the basis of these developments the Court concludes that "Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner."⁴³

The Court rejected the argument that the Jones Act and the Death

³⁸ *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 158-59 (1964) (dissenting opinion).

³⁹ 398 U.S. at 378.

⁴⁰ *Id.* at 379-88.

⁴¹ *Id.* at 388.

⁴² *Id.* at 390.

⁴³ *Id.* at 393.

on the High Seas Act preempted the field, concluding that a refusal to recognize a general maritime remedy for wrongful death "would perpetuate three anomalies of present law":⁴⁴ (1) "the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law . . . produces liability if the victim is merely injured, but frequently not if he is killed,"⁴⁵ (2) "that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit . . . but not within the territorial waters of a State whose local statute excludes unseaworthiness claims,"⁴⁶ and (3) "that a true seaman—that is, a member of the ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a long-shoreman . . . does have such a remedy when allowed by state statute."⁴⁷

Accordingly the Court overruled *The Harrisburg*. But in so doing it went beyond the language necessary to decide the case before it and held: "an action does lie under general maritime law for death caused by violation of maritime duties."⁴⁸ The Court went to the trouble to append to its decision a footnote which makes it clear that *Gillespie* is no longer good law;⁴⁹ in short to specify that the Jones Act shall no longer be the exclusive remedy for the wrongful death of a seaman within territorial waters. The result of the Court's holding seems to be that a breach of *either* maritime duty resulting in *either* injury or death on *either* territorial or non-territorial waters will result in liability. Thus the anomalies and inequities are eliminated, and the only holdover problem from the pre-*Moragne* law is that created by the *Sieracki* line of cases, namely the determination of who is owed these duties.

THE BENEFICIARIES

The Court left open the question as to who should be the beneficiaries for this new right of action.⁵⁰ There appear to be four possible schemes of making this determination: (1) that followed by the Death on the High Seas Act which provides damages "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative,"⁵¹ (2) that

⁴⁴ *Id.* at 395.

⁴⁵ *Id.* at 395.

⁴⁶ *Id.* at 395.

⁴⁷ *Id.* at 395-96.

⁴⁸ *Id.* at 409.

⁴⁹ *Id.* at 396 n.12.

⁵⁰ *Id.* at 408.

⁵¹ 46 U.S.C. § 761 (1964).

followed by the Jones Act which incorporates the FELA and provides a tightly structured scheme "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee,"⁵² (3) that followed by the Longshoremen's and Harbor Workers' Compensation Act,⁵³ which provides standardized amounts in the manner of typical workmen's compensation acts, and (4) that followed by an applicable state wrongful death statute. The first three were mentioned by the Court⁵⁴ and would seem to be the prime candidates. One of the reasons advanced by the Court in *Moragne* for its decision is the discrepancy between various state laws; and this factor would probably eliminate the fourth possibility. Of the remaining three, the Court appears to lean heavily toward the first, the Death on the High Seas Act:

It is the congressional enactment that deals specifically and exclusively with actions for wrongful death, and that simply provides a remedy—for deaths on the high seas—for breaches of the duties imposed by maritime law. In contrast, the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seaman against their employers—based on violations of the special standard of negligence imposed under the Federal Employers' Liability Act. That standard appears to be unlike any imposed by general maritime law. Further, although the Longshoremen's and Harbor Workers' Compensation Act is applicable to longshoremen such as petitioner's late husband, its principles of recovery are wholly foreign to those of general maritime law—like most workmen's compensation laws, it deals only with the responsibilities of employers for death or injury to their employees, and provides standardized amounts of compensation regardless of fault on the part of the employer.

The only one of these statutes that applies not just to a class of workers but to any "person," and that bases liability on conduct violative of general maritime law, is the Death on the High Seas Act. The borrowing of its schedule of beneficiaries, argues the United States, will not only effectuate the expressed congressional preference in this area but will also promote uniformity by ensuring that the beneficiaries will be the same for identical torts, rather than varying with the employment status of the decedent.⁵⁵

⁵² 45 U.S.C. § 51 (1964).

⁵³ 33 U.S.C. §§ 901-50 (1964).

⁵⁴ 398 U.S. at 407-08.

⁵⁵ *Id.*

Rather than determine the issue, however, the court left it for "further sifting through the lower courts."⁵⁶

CONCLUSION

Both from the standpoint of providing equitable treatment for all maritime workers and from the standpoint of providing a more uniform body of law in the maritime tort area, there is little question but that *Moragne* is properly decided. The inequity of the pre-*Moragne* law, as pointed out by Justice Goldberg, was so apparent as to be beyond dispute. The only real choices open to the court in eliminating this inequity were to reduce the recovery available to land-based workers so as to bring them into line with seagoing workers, or to extend the recovery available to seagoing workers. In light of recent trends in tort law—not only in maritime law, but also in products liability and other areas—for the Court to have chosen the first alternative would have been to turn back the hands of time. Its commendable choice of the second alternative creates a uniform, equitable and much more easily understandable body of law to replace what had been a totally unsatisfactory morass.

LOUIS W. PAYNE, JR.

Civil Rights—Section 1983 Action Lies for Gross and Culpable Negligence

Section I of the Civil Rights Act of 1871, now 42 United States Code section 1983,¹ in recent years has been relied upon increasingly by individuals seeking redress for alleged deprivations of constitutional rights under color of law. In *Jenkins v. Averett*,² the Court of Appeals for the Fourth Circuit has broadened the scope of conduct actionable under this statute. Robert Jenkins, an 18-year-old black youth, was shot by a policeman in the course of a pursuit following a confrontation with some white youths in Asheville, North Carolina. Jenkins brought suit in the United States District Court to recover damages under section 1983, and for

⁵⁶ *Id.* at 408.

¹ 42 U.S.C. § 1983 (1964) states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

² 424 F.2d 1228 (4th Cir. 1970).